12-3300-14693-1

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE BOARD OF WATER AND SOIL RESOURCES

In the Matter of the Proposed Adoption of Rules Relating to the Wetland Conservation Act of 1991, Minnesota Rules, Chapter 8420.

REPORT OF THE ADMINISTRATIVE LAW JUDGE

The above-entitled matter was heard by Administrative Law Judge Steve M. Mihalchick on March 26, 2002 at 1:30 p.m. and 7:00 p.m. in the Bell and Alexander Room, Saint Cloud Civic Center, 10 Fourth Avenue South, Saint Cloud Minnesota.

Approximately thirty-five persons attended the two hearing sessions. Twenty-four persons signed the hearing register. The hearing continued until all interested persons, groups or associations in attendance had an opportunity to be heard concerning the adoption of these rules.

William Szotkowki, Assistant Attorney General, appeared on behalf of the Board of Water and Soil Resources ("the Board"). The hearing panel consisted of John Jaschke, Administrator, and Dan Ecklund, Hydrologist, both of the Board's Land and Water Section.

The record remained open for the submission of written comments for thirteen calendar days following the final day of hearing, to April 9, 2002. Pursuant to Minn. Stat. § 14.15, subd. 1, five working days were then allowed for the filing of responsive comments. At the close of business on April 16, 2002, the rulemaking record closed for all purposes.[1] The Administrative Law Judge received twenty-three written comments from interested persons prior to and during the hearing and during the comment and response periods. The Department submitted written comments during the comment and response periods and made changes to the proposed rule.

This Report is part of a rulemaking proceeding held pursuant to Minn. Stat. §§ 14.131 to 14.20, to hear public comment, to determine whether the Minnesota Board of Water and Soil Resources ("the Board" or "BWSR") has fulfilled all relevant substantive and procedural requirements of law applicable to the adoption of the rules and whether the proposed rules are needed and reasonable.

This Report must be available for review to all interested persons upon request for at least five working days before the Board takes any further action on the proposed amendments. The Board may then adopt a final rule, or modify or withdraw its proposed amendments.

When the Board files the rule with the Secretary of State, it shall give notice on the day of filing to all persons who requested that they be informed of the filing.

Based upon all the testimony, exhibits, and written comments, the Administrative Law Judge makes the following:

FINDINGS OF FACT

Rulemaking Legal Standards

1. Under Minnesota law,[2] one of the determinations that must be made in a rulemaking proceeding is whether the agency has established the need for and reasonableness of the proposed rules by an affirmative presentation of facts. In support of a rule, an agency may rely on legislative facts, namely general facts concerning questions of law, policy and discretion, or it may simply rely on interpretation of a statute, or stated policy preferences.[3] The Board prepared a Statement of Need and Reasonableness (SONAR)[4] and Addendum to the SONAR[5] in support of its proposed rules. At the hearing, the Board relied upon the SONAR and Addendum as its affirmative presentation of need and reasonableness for the proposed amendments. The SONAR and Addendum were supplemented by comments made by Board staff at the public hearing, and by the Board's written post-hearing comments and reply.

2. The question of whether a rule has been shown to be reasonable focuses on whether it has been shown to have a rational basis, or whether it is arbitrary, based upon the rulemaking record. Minnesota case law has equated an unreasonable rule with an arbitrary rule.[6] Arbitrary or unreasonable agency action is action without consideration and in disregard of the facts and circumstances of the case.[7] A rule is generally found to be reasonable if it is rationally related to the end sought to be achieved by the governing statute.[8] The Minnesota Supreme Court has further defined an agency's burden in adopting rules by requiring it to "explain on what evidence it is relying and how the evidence connects rationally with the agency's choice of action to be taken."[9]

3. Reasonable minds might be divided about the wisdom of a certain course of action. An agency is legally entitled to make choices between possible approaches so long as its choice is rational. It is not the role of the Administrative Law Judge to determine which policy alternative presents the "best" approach, since this would invade the policy-making discretion of the agency. The question is, rather, whether the choice made by the agency is one that a rational person could have made.[10]

4. In addition to need and reasonableness, the Administrative Law Judge must also assess whether the rule adoption procedure was complied with, whether the rule grants undue discretion, whether an agency has statutory authority to adopt the rule, whether the rule is unconstitutional or otherwise illegal, whether the rule constitutes an undue delegation of authority to another entity, or whether the proposed language is not a rule.[11]

5. This Report discusses the portions of the proposed rules that received significant critical comment or otherwise require examination. Accordingly, this Report will not discuss each proposed rule, nor will it respond to each comment that was submitted. Every submission has been read and considered. Moreover, because the Board addressed most comments in its posthearing comments[12] and reply,[13] there is no need to do so again. The Administrative Law Judge finds that the Board has demonstrated the need for and reasonableness of all provisions of the rules that are not discussed in this Report, that such provisions are within the Board's statutory authority, and that there are no other problems that prevent their adoption.

6. Where changes have been made to the rules after publication in the State Register, the Administrative Law Judge must determine if the new language is substantially different from that which was proposed originally.[14] Unless mentioned specifically, any language proposed by the Board that differs from the rule as published in the State Register is found not to be substantially different.

Procedural Requirements

7. On January 22, 2002, the Board filed copies of the proposed Notice of Hearing, proposed rules, and draft SONAR with the Office of Administrative Hearings. The filings complied with Minn. R. 1400.2080, subp. 5. On the same date, the Board also filed a proposed additional notice plan for its Notice of Hearing and requested that the plan be approved pursuant to Minn. R. 1400.2060. By letter of January 28, 2002, Administrative Law Richard C. Luis approved the additional notice plan.

8. At the hearing on March 26, 2002, the Department filed the following documents as required by Minn. R. 1400.2220:

a. The Board's Request for Comments as published in the State Register on June 25, 2001;[15]

b. The Board's Resolution No. 01-77, authorizing Board staff to conduct rulemaking related to the Wetland Conservation Act;[16]

c. The proposed rules dated January 24, 2002, including the Revisor's approval;[17]

d. The SONAR;[18]

e. The March 25, 2002 Addendum to the SONAR.[19]

f. The certification that the Board mailed a copy of the SONAR to the Legislative Reference Library;[20]

g. The Dual Notice of Hearing as mailed and published in the State Register on February 11, 2002;[21]

h. The letter approving the Board's Additional Notice Plan;[22]

i. Certificate of Mailing the Dual Notice of Hearing and Certificate of Mailing List;[23]

j. A copy of the transmittal letter sending a copy of the SONAR and other documents to Legislators on February 5, 2002;[24]

k. A description of some of the public participation and outreach conducted by the Board, including copies of the Board's webpage, a listing of rule development stakeholders, a listing of informational meetings held throughout the State, and a draft timeline for rule development.[25]

l. Written comments received by the Board in response to proposed rules.[26]

m. The Notice of Hearing and Certificate of Mailing that Notice to the persons requesting a hearing;[27]

n. The Board's proposed changes to the rule as it was published in the State Register.[28]

9. During the hearing, the Builders Association of Minnesota (Builders Association) asserted that the Board provided inadequate notice to affected groups of the proposed changes to the rules.[29] The Board responded that the Builders Association has participated since in the rulemaking process since the previous summer.[30] The list of "Rule Development Stakeholders" contains nearly 200 names and includes business, landowner, agricultural, environmental, recreational, technical, and local government interests.[31] The Builders Association was on the list and participated in the process.[32] Six informational meetings were held in February 2002 for stakeholders.

10. The rulemaking process contemplates agencies making changes to the proposed rule in response to public comments. An agency is not required to provide further notice of changes to its proposed rule made in advance of the hearing. No party was provided inadequate notice in this proceeding.

11. The Department has complied with all applicable procedural requirements necessary to adoption of the proposed rules.

Nature of the Proposed Rules and Statutory Authority.

12. The Board adopted exempt rules governing implementation of the Wetland Conservation Act (Minn. Stat. § 103G.2242). The exempt rules expire on July 31, 2002. The Board is proposing these rules to convert them from exempt rules (adopted under Minn. Stat. §§ 14.386 to 14.388) to permanent rules. The proposed rules incorporate changes from the previously adopted exempt rule. The Legislature directed the Board to simplify and consolidate wetland regulation by adopting the exempt rules.[33] That direction also stated:

> (b) The rules authorized under paragraph (a) are exempt from the rulemaking provisions of Minnesota Statutes, chapter 14, except that Minnesota Statutes, section 14.386, applies and the proposed rules must be submitted to the members of senate and house environment and natural resource and agriculture policy committees at least 30 days prior to being published in the State Register. The amended rules are effective for two years from the date of publication of the rules in the State Register unless they are superseded by permanent rules.[34]

13. Under Laws of Minnesota 2000, Chapter 382, Section 20, the Board has the authority to adopt necessary rules regarding the regulation of wetlands in Minnesota. In addition to that session law, the Board cites Minn. Stat. §§ 103B.3355, 103G.2242, and 103B.101 as specific statutory authority to adopt the proposed rules.[35] Each of those statutes grants the Board rulemaking authority. Minn. Stat. § 103G.2242, subd. 1 requires the Board, in consultation with the Commissioner of Natural Resources, to "adopt rules governing the approval of wetland value replacement plans under this section and public waters work permits affecting public waters wetlands …." Minn. Stat. §§ 103B.3355(b) requires the Board to adopt rules that establish the process for determining the functions and public value of wetlands. The Department is expressly authorized by these laws to adopt the proposed rules as permanent rules.

Cost and Alternative Assessments in SONAR.

14. Minn. Stat. § 14.131 provides that state agencies proposing rules must include in the SONAR a description of the classes of persons affected by the rule, including those incurring costs and those reaping benefits; the probable effect upon state agencies and state revenues; whether less costly or less intrusive means exist for achieving the rule's goals; what alternatives were considered and the reasons why any such alternatives were not chosen; the costs that will be incurred complying with the rule; and differences between the proposed rules and existing federal regulations.

15. Minn. Stat. § 14.131, also requires that an agency include in its SONAR a description of how it "considered and implemented the legislative policy supporting performance-based regulatory systems set forth in section 14.002." Section 14.002 states, in relevant part, that "whenever feasible, state agencies must develop rules and regulatory programs that emphasize superior achievement in meeting the agency's regulatory objectives and maximum flexibility for the regulated party and the agency in meeting those goals."

16. The Board described the classes of affected persons in the SONAR, as follows:

> The proposed rule will most significantly affect present and future landowners of property containing wetlands. It will also affect local governments who have the primary responsibility to carry out the WCA law and rule requirements. Cost of the proposed rule would be primarily borne by the affected landowners, taxpayers supporting local

> governmental operations, and state taxpayers who support state grants to local governments and the state operations required to oversee the program. However, recent legislative changes incorporated in these proposed rules attempt to reduce these costs by providing reductions in regulatory overlap of state water regulations and increasing flexibility for local governments in achieving the goals of wetland protection. Beneficiaries of the rule will be the general citizenry, including those affected above, and interest groups, who realize the environmental benefits of wetland protection (water quality, flood control, fish and wildlife habitat, etc.). Also, financial benefits are likely to continue to accrue to environmental consultants who are hired by landowners to evaluate and prepare solutions to the regulatory requirements and persons enrolled in the statewide wetland bank.[36]

17. The Board concluded that no less intrusive or less costly alternative could be proposed to these rules, since these rules are the comprehensive approach to wetland regulation that simplified the process. The Board considered referencing the statutory language in the rule rather than restating that language in its proposed rule. The Board concluded that "the confusion it would cause among local governments implementing the program and landowners affected by this action would quickly outweigh any initial savings in printing costs."[37] While the costs of compliance with the rule were described as "difficult to determine," the Board concluded that compliance with the rule would reduce costs through reduced regulatory burdens on landowners and increased flexibility for local units of government.[38] Regarding consistency with applicable federal regulations, the Board stated:

> Wherever possible, attempts have been made to make the proposed rule (within the confines of the statute) consistent with similar federal wetland program regulations (e.g. Section 404 of the Federal Clean Water Act and the Federal Agricultural Improvement and Reform Act). Additionally, these rules incorporate various reductions of regulatory duplication with Minnesota Rules 6115 governing the regulation of protected waters by the Minnesota Department of Natural Resources. However, much of the proposed rules cover areas that are not addressed by federal laws or regulations.[39]

18. The Administrative Law Judge finds that the Board has met the requirements set forth in Minn. Stat. § 14.131 for assessing the impact of the proposed rules, including consideration and implementation of the legislative policy supporting performance-based regulatory systems.

8420.0105 - Scope

19. Rule part 8420.0105 establishes the scope of these rules (hereinafter "WCA rules") implementing the Wetland Conservation Act. The Board noted that under the current rule, "drain or fill projects can be undertaken in such a manner that the excavation associated with them could cause additional unregulated loss of

wetlands."[40] The Board addresses this situation by proposing to modify the rule part to expressly include such projects under the WCA rules. Both the Department of Natural Resources (DNR) and the affected local government unit (LGU) have the responsibility for making determinations on project issues. The Board proposed affording the opportunity for waivers by either the DNR or the LGU when the determination is made by the other entity and the required standards are applied.

20. The Board initially proposed to allow determination of compliance with standards of chapter 7050, the water quality rules of the Minnesota Pollution Control Agency (MPCA), in the WCA rules. The MPCA indicated that this determination would be better made in chapter 7050.[41] In response, the Board deleted the reference to chapter 7050. The Board has demonstrated that rule part 8420.0105 is needed and reasonable, as modified. The proposed modification is not a substantial change from the rule as initially published in the *State Register*.

8420.0110 - Definitions

21. Rule part 8420.0110 sets out definitions of terms used in the WCA rules. Most of the terms defined are not controversial. The terms that were the subject of comments or otherwise need discussion will be specifically addressed. The remaining definitions are found to be needed and reasonable.

Subpart 4 – Agricultural Land

22. Subpart 4 defines "agricultural land" for the purposes of the WCA rules. The Board noted that confusion exists over whether land used for the production of derivative agricultural products (such as ethanol) falls within the rule definition.[42] The Board addressed this situation by adding language clarifying that the principal use of the land must be for the cultivation of plants or raising farm animals. The language also expressly includes former agricultural land enrolled in conservation easements.[43] The proposed rule, as modified, is needed and reasonable to remove potential ambiguity in the type of land included. The proposed modification is not a substantial change.

Subpart 34a – Permanently and Semipermanently Flooded Area of a Type 3, 4, or 5 Wetland

23. Subpart 34a defines portions of type 3, 4, or 5 wetlands that have water present for a sufficient period of time to leave evidence on the landscape. Mark Kjolhaug, Kjolhaug Environmental Services Company noted that the proposed rule differs from the approach taken in Circular 39 and the Cowardin document.[44] The Board indicated that the approach in subpart 34a is consistent with the DNR's approach in chapter 6115 (setting the Ordinary High Water Level (OHWL) of public waters).[45] Michael Whitt, President of the Wetland Delineators Association (WDA), expressed concern that using the OHWL would cause confusion due to a conflict with the DNR and the absence of technical training.[46] Ronald Peterson, President of Peterson Environmental Consulting, asserted that the use of the DNR approach is inconsistent with the Board's jurisdiction as set by statute.[47] Consistency between agencies is an

express goal of the Legislature in directing the Board to adopt these rules.[48] The proposed rule provides consistency in wetland regulation. The definition does not purport to limit the Board's jurisdiction over wetlands. The Board has demonstrated that subpart 34a is needed and reasonable.

Subpart 54a –Wetland Type

24. Subpart 54a defines wetland type as a classification as set out in the U.S. Fish and Wildlife Service Circular 39. The Board has proposed to add a reference to the Cowardin document as a "separate, parallel wetland typing that may be used to characterize components of a wetland.[49] The SONAR indicated that the Cowardin document is used for clarification throughout the rules.[50] The rule was modified to provide reference to both the available year of issue and the most recent reprint. The Board has demonstrated that subpart 54a is needed and reasonable. The new language is not a substantial change.

Municipal

25. The system for eliminating the net loss of wetlands relies on credits obtained by applicants for performing work that restores or creates wetlands to replace those taken by a project. Obtaining wetland replacement credit for using buffers around projects depends on the size of the buffer. The required size differs between municipal and nonmunicipal areas. Commentators objected that the rule lacked a definition of "municipal." The Board responded by proposing to incorporate a reference to the definition of the term in Minn. Stat. § 103G.005. The reference is needed and reasonable and does not constitute a substantial change.

8420.0112 – Incorporation by Reference

26. Application of the WCA rules requires consideration and adoption of various management practices by LGUs. To facilitate the use of these management practices, rule part 8420.0112 incorporates by reference a number of commonly used documents. The Board added language to incorporate subsequent updates. The Board modified the rule part to reference an earlier edition of Circular 39, since the later edition appears to be out of print and unavailable. The Board also clarified that a strikethrough of item N (incorporating a publication of the Minnesota Storm Water Advisory Group) was inadvertent.[51] The Board has demonstrated that the incorporation of the documents listed in part 8420.0112 is needed and reasonable. The proposed modifications are not substantial changes.

8420.0112 – Exemption Standards

27. Various types of activities that are exempt from the wetland replacement plan requirements are set out in rule part 8420.0112. Subpart 1 sets out the standards for land to meet the agricultural activities exemption. The Board originally proposed eliminating references to "set aside" land, since the term is no longer used. The Board proposed to modify the rule to retain the limitation that only wetland types 1 and 2 are eligible for the exemption.[52] The Board had not intended to suggest that the exemption

applied to any other wetland types.[53] The rule, as modified, is needed and reasonable. The proposed modification is not a substantial change.

28. Subpart 9 sets out the standards for de minimis exceptions.[54] The Board originally proposed language developed amongst stakeholders to determine the dominant wetland type for a project area. The dominant wetland type within 1000 feet of the project was to be used for wetlands greater than 40 acres. After receiving numerous comments about the feasibility of the 1000-foot measurement, the Board modified the subpart to use a 300-foot measurement.[55] The Minnesota Center for Environmental Advocacy (MCEA) objected to the 300-foot measurement as allowing impacts to wetlands that should be subject to the WCA permit review and mitigation process.[56] The point of a de minimis exception is that, while some impact may be present, the impact within some distance of the project location is typically so minor that the permitting and mitigation process is unduly burdensome. The Board has demonstrated the 300-foot limitation to be needed and reasonable.

29. The Board also added language developed at the last stakeholder meeting concerning the prohibition against combining exemptions. The modification clarifies how exemptions are to be treated. For example, linear projects that extend between discrete wetlands could qualify for an exemption in each wetland without "combining" the exemptions.[57] MCEA objected to the modification as it could "broaden the WCA exemptions and weaken WCA's protection of wetlands …."[58] The Board withdrew the clarifying modification, returning the sentence to the wording in the existing rule. The subpart, as finally proposed, is needed and reasonable. The proposed modifications are not substantial changes.

8420.0200 – Determining Local Government Unit; Duties

30. For some projects, the affected area falls across LGU boundaries. Subpart 1 of rule part 8420.0200 sets out the method of assigning responsibility to a single LGU under that circumstance. The Board also added a reference to the State as an LGU, where the activity occurs on state land. Subpart 2 lists the responsibilities of each LGU under the WCA rules. Item A requires that LGUs provide "knowledgeable and trained staff" to manage project reviews. Items B and C afford LGUs the option of delegating decisions to staff (with appeal to appointed or elected officials) and charging fees "necessary to cover the reasonable costs" of implementing the review process and advising applicants.

31. Jeffrey Broberg, Licensed Geologist for McGhien Betts Environmental Services, indicated that some LGU staff are not always knowledgeable and trained as required by the rule.[59] The WDA urged that all participants in the wetland determination process meet established standards.[60] Kitty Tepley, WCA Coordinator for Todd Soil & Water Conservation District, asserted that most LGUs and TEPs have well trained and experienced staff available to perform their functions.[61] Jeffrey Broberg expressed concern the LGUs with few applications would charge excessive fees to cover annual salaries of staff.[62] The WDA objected to the apparent conflict of interest between LGUs accepting fees that appear to be for consulting from applicants

and then deciding on their applications.[63] The Board responded that the fee provisions were part of Minn. Stat. § 103.2242(5) and Laws of Minnesota 2000, Chapter 382, Section 20.[64] The Board noted that advice is provided to LGUs as to how conflicts of interest can be avoided.[65] The rule is consistent with the governing statutory provisions and is needed and reasonable.

8420.0210 – Exemption Determinations

32. Landowners have the option of seeking an exemption determination from the appropriate LGU before conducting work. Rule part 8420.0210 sets out the manner in which the LGU makes that determination. The Board originally proposed language to allow LGUs to consider applications incomplete until field verification can be performed. The intent was to avoid situations where the LGU could not conduct the verification due to weather or other conditions within sixty days of the application.[66] MCEA supports the originally proposed language as preventing LGUs from "being held hostage to the narrow 60-day deadline in Minnesota Statutes 15.99."[67] That statute does set a sixty-day requirement. But the statute also provides an extension period of up to sixty days for an LGU, requiring only that the applicant be notified in writing of the reason for extension and its anticipated length.[68] The Board withdrew the proposed language regarding incomplete applications. The Board also deleted a part of the existing rule that characterized the statute as "generally" requiring a decision within 60 days of receipt of a complete application. The modified rule comports with the statutory language regarding applications and removes existing language that does not function as a rule. Rule part 8420.0210, as modified, is needed and reasonable. The modification does not constitute a substantial change.

8420.0220 – No Loss Determinations
8420.0225 – Wetland Boundary or Type Determinations
8420.0230 – Replacement Plan Determinations

33. Various determinations to be made by LGUs are set out in rule parts 8420.0220, 8420.0225, and 8420.0230. Each of these parts contained the incomplete application language proposed in part 8420.0210 and discussed in the foregoing Finding. The same conflict with Minn. Stat. § 15.99 is present in each usage of that language. The Board withdrew the proposed language regarding incomplete applications from each of these rule parts. The Board also removed the "generally" statement (discussed in the foregoing Finding) from rule parts 8420.0220 and 8420.0230. The Board removed language duplicating that in Minn. Stat. 15.99 from rule part 8420.0225. The modified rules comport with the statutory language regarding applications. Rule parts 8420.0220, 8420.0225, and 8420.0230, as modified, are needed and reasonable. The modification does not constitute a substantial change in any of the rule parts.

8420.0240 – Technical Evaluation Panel

34. Rule part 8420.0240 establishes for each LGU a technical evaluation panel (TEP) of consisting of a Board staffer, an employee of the Soil and Water

Conservation District of the County, and an appointee from the LGU. Each member must be a technical professional. The Board proposed adding a member from the DNR where the project affects public water or public waters wetlands. The DNR member would be required where the project is located in a shoreland wetland protection zone or within 1,000 feet of public waters or public waters wetlands. The TEP issues findings and recommendations on wetland issues to the LGU, which makes the final decision to approve or deny the application.

35. Jeffrey Broberg objected to the decision being made by LGUs, in situations where the decisionmakers lack technical expertise. The applicable statute is clear that the governing body of the LGU is the decisionmaker on such applications.[69] The Board noted that a critical element in appeals has been documentation of an LGU's reason for a decision, particularly where the LGU acted contrary to the TEP recommendation.[70] To address the need for such documentation, the Board modified part 8420.0240 to require the LGU to state its reasons when the LGU does not follow the TEP recommendation. MCEA expressed concern that the language focused on the TEP recommendation and neglected the TEP findings.[71] The Board modified the proposed rule to add a reference to the TEP findings when the LGU is making its decision. The rule, as modified, is needed and reasonable. The modification does not constitute a substantial change.

36. BAM urged that the TEP process be opened to participation by the applicant. The commentators suggested that the Open Meeting Law[72] and constitutional due process required that the TEP meetings be open.[73] The Board analyzed the issue and concluded that the TEP process does not fall within the classes of meetings that are required to be open.[74] The Board noted the TEPs can and do request additional information from applicants where needed to arrive at a recommendation.[75] Requiring access to the TEP process was considered by the Board to be detrimental to the technical advisory nature of the process.[76] The applicant's right to hearing is met when the LGU meets to decide on the application. The Board's approach has been demonstrated to be needed and reasonable and consistent with the Open Meeting Law and constitutional due process.

8420.0260 – Penalty for Local Government Unit Failure to Apply Law

37. Rule part 8420.260 sets out the standards for LGUs to notify the Board that they are carrying out their responsibilities under the WCA and these rules. LGUs that fail to do so are subject to penalties under item B of the rule part. Such a failure can include not having knowledgeable and experienced staff. The Board modified the rule to replace "expertise" with "experience" to avoid confusion as to what standard must be met by the LGUs. MCEA urged greater clarification of the rule by requiring some combination of education and practical experience.[77] The Board declined to make that change.

38. The Board is expressly authorized to impose penalties on LGUs for noncompliance.[78] While conducting the proceedings to determine if an LGU is noncompliant, the Board is authorized to impose a moratorium on WCA-governed

projects. The Minnehaha Creek Watershed District urged that the process be streamlined by shortening the LGU response period and requiring a hearing (to remove the time needed for Board authorization).[79] The commentator also suggested designating another LGU to make required assessments while a moratorium is in place on the LGU with jurisdiction. The Board responded that the issues in the process are complicated and need time to properly assess.[80] There is no evidence in the record to suggest that the time required to process sanction determinations is unreasonable. Reassigning authority for LGU determinations is outside the statutory process and potentially renders moratoria less effective as sanctions. The proposed rule, as modified, is needed and reasonable. The change does not constitute a substantial change.

8420.0530 – Replacement Plan Components

39. Documentation supporting the means of replacing impacted wetland acreage is required under part 8420.0530. For replacement wetlands, the standards are set out in item D. Item D(14) requires a five-year vegetation management plan for establishing appropriate plants and controlling invasive or nonnative species. In another portion of the rule the standard was "prevent and minimize" such harmful plant species. Based on comments from participants, the Board proposed "control" of invasive, nonnative plants as part of the five-year plan. The WDA expressed concern that "control" is an ambiguous standard.[81] WDA urged that a percentage of invasive plant be used to clarify the rule.[82] MCEA asserted that, as a standard, control is too lax to prevent adverse impact on replacement wetlands. Mark Kjolhaug of Kjolhaug Environmental Consulting indicated that even controlling invasive plants can be a challenging effort that consumes many work hours on an ongoing basis.[83]

40. At the hearing, the Board clarified that the standard was not eradication or elimination and that the required amount of control would vary depending on the circumstances of the wetland replacement.[84] The Board modified the rule to eliminate references to two examples to prevent any misapprehension that only those two species need be controlled. Rob Bouta of Westwood Professional Services supported the control standard as implying "a reasonable level of effort to prevent and minimize the invasion of non-native, invasive species."[85] The commentator expressed concern that one species, reed canary grass, was a frequently invasive plant for which there was no effective control method.[86] Control is a standard that adapts well to the case-by-case nature of wetland replacement issues. The Board has demonstrated the need and reasonableness of control as the standard for addressing the problem of non-native, invasive plant species in replacement wetlands. The rule, as modified, is needed and reasonable. The change does not constitute a substantial change.

8420.0540 – Replacement Plan Criteria

41. A central tenet of the WCA is the concept of "no net loss" of wetlands.[87] Where a project removes or affects wetlands, an equivalent amount of wetland must be created or restored. The replacement of the equivalent amount of wetland is done according to a plan subject to consideration and approval of the LGU. Rule part

8420.0540 sets out an order of preference to be applied by the LGU in considering proposed replacement plans. The WDA considered "restoration of partially drained wetlands as having the highest probability of success among the various techniques to restore or create wetlands."[88] The DNR requested the rule be modified to prefer restoration over other methods to ensure that the no net loss goal is met.[89] The Board modified the language in subpart 2 to clarify that the preference for wetland restoration over creation included a preference for restoration of completely impacted wetlands over other methods of replacement. The proposed rule, as modified, is needed and reasonable. The change does not constitute a substantial change.

8420.0541 – Actions Eligible for Credit

42. A system of credits is used to assess compliance with the no net loss goal of the WCA. Replacement credit, public value credit, and banking credit are the means used in the WCA rule for measuring the offset of a projects impact on wetlands. Part 8420.0541.[90] The reasons for this language were set out in the SONAR as:

> The purpose of these revisions and modifications are five-fold: (1) consolidate the location of replacement criteria into one spot in the rule; (2) provide incentives for restoration of degraded wetlands across the state; (3) provide incentives for vegetative and hydrologic restoration of wetlands that are degraded across the state; (4) clarify portions of the rule that are vague, most notably, the storm water facilities and gravel pit items; and (5) to develop standards for replacement that are likely to result in perpetual, fully functioning , minimum maintenance wetlands based on the most recent scientific research and technical capabilities in order to maintain a no-net-loss of wetland quantity, quality, and biological diversity as required by Minnesota Statute 103A.201.[91]

43. A variety of restoration methods and types of land are discussed in the rule part, including the option to use of buffer zones to protect wetland areas. As originally proposed, subparts 3 and 6 increase the size of the upland buffer zone to be eligible for credit. The existing rule requires a minimum of 16.5 feet of width. The proposed subpart 3 originally sought an average width of 50 feet (for wetlands up to 2.5 acres) and 100 feet (for wetlands larger than 2.5 acres).

44. The Board modified the rule to require 50-foot buffer zones in municipal areas and 100-foot buffer zones in nonmunicipal areas before credit could be granted. BAM asserted that the change is arbitrary, unreasonable and is an unconstitutional taking.[92] BAM also objected to the distinction between municipal and nonmunicipal areas as being undefined and ambiguous.[93] Michael Burton, Land Development Project Manager for Lundgren Brothers Construction, maintained that adding unwarranted buffer areas would reduce the density and increase the cost of housing.[94] Leslie Stovring, Environmental Coordinator for the City of Eden Prairie, related that Eden Prairie requires buffers from 25 to 50 feet. She indicated that requiring both native, noninvasive vegetation and a 50-foot buffer is "not realistic or practical."[95] Ellen Sones and David Thill, Specialists for the Hennepin Conservation District, indicated that

100-foot buffers in the metropolitan area would be difficult to achieve. The Hennepin Conservation District urged the use of 50 to 25 foot buffers.[96] Wayne Jacobson, P.S.S. and P.W.S. for Applied Environmental Services, suggested a variety of buffer widths ranging from 16.5 feet to 100 feet based on location, wetland type, wetland quality, riparian impact, and topography.[97] MCEA supported the 100-foot buffer requirement, but opposed any reduction of buffers to below 75 feet in width.[98]

45. Beth Kunkel, URS Corporation, urged changing the standard of measurement from a minimum width to an average width. The DNR urged changing the optional buffer zone standards to mandatory requirements as a means of protecting wildlife.[99] The DNR also expressed concern that the credit system could result in a net loss of wetlands.[100]

46. Upon consideration of the comments, the Board modified the proposed rule to remove references to size from subpart 3 and refer to subpart 6 for the buffer standards. In subpart 6, the Board modified the proposed width of buffers to an average of 50 feet in nonmunicipal areas and 25 feet in municipal areas. The Board also set the replacement credit as not exceeding 100 percent of the replacement wetland area. The Board supported the changes as making the option reasonably available to applicants, balancing the current state of scientific research, practical application, flexibility, and simplicity.[101] The proposed rule, as modified, is needed and reasonable. The change does not constitute a substantial change.

8420.0548 – Special Considerations

47. Rule part 8420.0548 sets out other factors that are outside of the specific wetland impacts which must be considered by LGUs. Subpart 2, as originally proposed, required denial by the LGU where there was an endangered species present, the activity would constitute a taking, and the Commissioner of Natural Resources did not issue a permit authorizing that taking. DNR suggested, based on conversations with the U.S. Fish and Wildlife Service, that the subpart could be clarified by revision and suggested language to remove unnecessary references.[102] The Board agreed with the suggestion and replaced the language of subpart 2 with the language suggested by DNR.[103] The rule, as modified, is needed and reasonable. The new language does not constitute a substantial change.

8420.0550 – Wetland Replacement Standards

48. Specific requirements to be met in conducting wetland replacement are set out in rule part 8420.0550. The Board proposed expressly requiring the LGU to determine what measures would be necessary to effectively replace the function and value of wetlands lost through a project in subpart 1. Subpart 2 sets out standards to be followed in wetland replacement (unless the TEP determines that a standard is not appropriate). As originally proposed, reasonable steps were required to "prevent and manage" nonnative, invasive species. The Board changed "prevent and manage" to "control" in describing the obligation to limit invasive plant species to conform with part 8420.0530 D(14) (discussed above). The Board emphasized that the term "control," as

used in the rule, means managing the invasive species to allow an opportunity for native non-invasive plants to become established.[104]

49. MCEA asserted that failure to prevent invasive plants from being established in an area eliminated the offset of the area on the impact to a wetland. Therefore, MCEA suggested that such a failure should result in a loss of any wetland credit for the affected area.[105] The Board has demonstrated that control is a reasonable standard to apply with regard to the problem of nonnative, invasive plant species. The change applies the same standard in similar assessments. The rule, as modified, is needed and reasonable. The new language does not constitute a substantial change.

8420.0730 – Administration and Management Authority

50. The Board operates a state wetland bank for implementing the banking portions of the WCA rules. Subpart 2 of part 8420.0730 establishes the procedures for handling deposits to the bank. The Board proposes language granting itself the discretion to reject or modify deposit applications. That discretion is limited by the standard to applications that have missing parts, are incorrect, or are inconsistent with the WCA rules. The proposed language provides adequate limitations against the exercise of undue discretion. The rule is needed and reasonable as proposed.

8420.0740 – Procedures

51. The procedures for establishing credits for deposits are set out in part 8420.0740. The existing rule allowed credit of up to 100 percent for deposited wetland acreage of up to ten acres and up to 90 percent for deposited wetland acreage of more than ten acres. The Board replaced this approach with the LGU's decision, based on the TEP recommendation, and supported by field measurements. The Board also changed the system of credits system to allow 15 percent immediately eligible for deposit if certain conditions are met. These modification are needed and reasonable.

52. Subpart 1 F. contains proposed language referring to Minn. Stat. § 15.99 process for LGU decisions. This proposed language includes the "generally requires" phrase that the Board deleted from parts 8420.0220 and 8420.0230, subpart 2. While the phrase is not strictly a rule, the continuing presence of that language does not rise to the level of a defect in the proposed rule. The Board may choose to delete the phrase to render the rules internally consistent, but it is not required to do so to render the rule needed or reasonable. Making the change, should the Board opt to do so, does not constitute a substantial change.

Based upon the foregoing Findings of Fact, the Administrative Law Judge makes the following:

CONCLUSIONS

1. The Board gave proper notice of this rulemaking hearing.

2. The Board has fulfilled the procedural requirements of Minn. Stat. § 14.14, subds. 1, 1a, and 2, and all other procedural requirements of law or rule.

3. The Board has demonstrated its statutory authority to adopt the proposed rules, and has fulfilled all other substantive requirements of law or rule within the meaning of Minn. Stat. §§ 14.05, subd. 1, 14.125, and 14.50 (i) and (ii).

4. The Board has demonstrated the need for and reasonableness of the proposed rules by an affirmative presentation of facts in the record within the meaning of Minn. Stat. §§ 14.14, subd. 2 and 14.50 (iii).

5. The additions and amendments to the proposed rules that were suggested by the Board after publication of the proposed rules in the State Register on February 11, 2002, do not result in rules that are substantially different from the proposed rules as published in the State Register within the meaning of Minn. Stat. §§ 14.05, subd. 2 and 14.15, subd. 3.

6. Any Findings that might properly be termed Conclusions and any Conclusions that might properly be termed Findings are hereby adopted as such.

7. A Finding or Conclusion of need and reasonableness in regard to any particular rule subsection does not preclude and should not discourage the Board from further modification of the proposed rules based upon an examination of the public comments, provided that no substantial change is made from the proposed rules as originally published, and provided that the rule finally adopted is based upon facts appearing in the record.

Based upon the foregoing Conclusions, the Administrative Law Judge makes the following:

RECOMMENDATION

IT IS HEREBY RECOMMENDED that the proposed rules be adopted.

Dated this 15th day of May, 2002.

/s/ Steve M. Mihalchick
STEVE M. MIHALCHICK
Administrative Law Judge

Reported: Transcript prepared.
Kirby A. Kennedy & Associates

[1] Pursuant to Minn. Stat. § 14.15, subd. 2, and Minn. R. 1400.2240, the Chief Administrative Law Judge has granted an extension for the preparation of this Report.
[2] Minn. Stat. § 14.14, subd. 2; Minn. R. 1400.2100.
[3] *Mammenga v. Department of Human Services*, 442 N.W.2d 786 (Minn. 1989); *Manufactured Hous. Inst. v. Pettersen*, 347 N.W.2d 238, 244 (Minn. 1984).
[4] Ex. 4.
[5] Ex. 5.
[6] *In re Hanson*, 275 N.W.2d 790 (Minn. 1978); *Hurley v. Chaffee*, 231 Minn. 362, 43 N.W.2d 281, 284 (1950).
[7] *Greenhill v. Bailey*, 519 F.2d 5, 19 (8th Cir. 1975).
[8] *Mammenga*, 442 N.W.2d at 789-90; *Broen Mem'l Home v. Minnesota Dept. of Human Services*, 364 N.W.2d 436, 444 (Minn. Ct. App. 1985).
[9] *Manufactured Hous. Inst. v. Pettersen*, 347 N.W.2d at 244.
[10] *Federal Sec. Adm'r v. Quaker Oats Co.*, 318 U.S. 218, 233 (1943).
[11] Minn. R. 1400.2100.
[12] Ex. 46.
[13] Ex. 53.
[14] Minn. Stat. § 14.05, subd. 2.
[15] Ex. 1.
[16] Ex. 2.
[17] Ex. 3.
[18] Ex. 4.
[19] Ex. 5.
[20] Ex. 6.
[21] Ex. 7.
[22] Ex. 8.
[23] Ex. 9.
[24] Ex. 10.
[25] Ex. 11.
[26] Ex. 12A-D.
[27] Ex. 13.
[28] Ex. 14.
[29] Transcript, at 52-53.
[30] *Id*. at 59.
[31] Ex. 11.
[32] *Id*.
[33] Laws of Minnesota 2000, Chapter 382, Section 20.
[34] *Id*.
[35] Ex. 1.
[36] Ex. 4 at 3.
[37] Ex. 4 at 3.
[38] Ex. 4, at 3-4.
[39] Ex. 4 at 4.
[40] Ex. 4 at 6.
[41] Ex. 15 at 1.
[42] Ex. 4 at 7.
[43] Id. at 1-2.
[44] Ex. 38. The Cowardin document is entitled *Classification of Wetlands and Deepwater Habitats of the United States* (Cowardin, et al. 1979 edition).
[45] Ex. 15 at 2.
[46] Ex. 29 at 2.
[47] Ex. 48 at 3.
[48] Laws of Minnesota 2000, Chapter 382, Section 20.
[49] Ex. 14 at 1037.
[50] Ex. 4 at 9.

[51] Ex. 15 at 2.
[52] Ex. 14 at 1040.
[53] Ex. 14 at 2.
[54] The term is derived from the Latin maxim, "*de minimis non curat lex*" meaning "the law does not concern itself with trifles." Black's Law Dictionary (7th Ed. 1999).
[55] Ex. 15 at 3.
[56] Ex. 44 at 2.
[57] Ex. 15 at 3.
[58] Ex. 44 at 3.
[59] Transcript at 71.
[60] Ex. 29 at 3.
[61] Ex. 34.
[62] *Id*. at 72-73.
[63] Ex. 29 at 3-4.
[64] Ex. 46 at 3.
[65] *Id*.; Ex. 23.
[66] Ex. 15 at 3.
[67] Ex. 44 at 3.
[68] Minn. Stat. § 15.99, subd. 3(f).
[69] Minn. Stat. § 103G.2242, subd. 1(b).
[70] Ex. 15 at 4.
[71] Ex. 44.
[72] Minn. Stat. Chap. 13D.
[73] Ex. 35 at 5.
[74] Ex. 24.
[75] Ex. 46 at 3.
[76] *Id*.
[77] Ex. 44 at 4.
[78] Minn. Stat. § 103G.2242, subd. 1(c).
[79] Ex. 47 at 1-2.
[80] Ex. 53 at 10.
[81] Transcript at 48.
[82] Ex. 29 at 6.
[83] Transcript at 106.
[84] Transcript at 31.
[85] Transcript at 118.
[86] Id. at 119.
[87] *See* Minn. Stat. §§ 103A.201, subd. 2(b)(1), 103G.222.
[88] Ex. 29 at 6.
[89] Ex. 15 at 5.
[90] The Board recodified subpart 2(D) of part 8420.0540 as part 8420.0541. Ex. 5 at 3.
[91] Ex. 4 at 19.
[92] Ex. 35 at 2-4.
[93] *Id*. at 4.
[94] Ex. 36.
[95] Ex. 37 at 3-4.
[96] Ex. 42 at 2.
[97] Ex. 28.
[98] Ex. 44 at 5.
[99] Ex. 40 at 3-4.
[100] Ex. 40 at 2.
[101] Ex. 53 at 5.
[102] Ex. 40 at 5.
[103] Ex. 53 at 10.
[104] Ex. 53 at 7.
[105] Ex. 44 at 4.